BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE:February 3, 1997

CASE NO: 95-INA-249

In the Matter of:

PALO ALTO ELECTRIC MOTOR CORP.
Employer,

On Behalf of:

ADOLFO TRIGUEROS,
Alien

Appearance: R. O. Large, Esq.
Palo Alto, California,
for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of the Alien Adolfo Trigueros ("Alien") filed by the Palo Alto Electric Motor, Corp. ("Employer"), pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. See 8 U.S.C. § 1182(a)(5)(A). An employer desiring to employ an alien

on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

Procedural background. On March 18, 1993, the Employer filed an application for labor certification to enable the Alien, a Salvadoran national, to fill the position of "Electromechanic & Motor Winder." (AF 19-56). The application describes the work of that position as follows:

> Repair, rewind, redesign electric motors, transformers; repair solid state controls, speed controls, gears. Requires two years trade school or equivalent training. 2 years experience with older type motors and transformers.

The qualifications included minimum formal education consisting of two years of college or trade school and two years of experience. AF 19.[1]

Notice of Finding. The May 27, 1994, Notice of Finding (NOF) advised the Employer that, subject to Employer's rebuttal, the CO would deny certification on the grounds that qualified U. S. workers who applied for this job were unlawfully rejected by the

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[1]While the CO designated the occupational title as "Instrument Repairer," which is occupational code 710.261.010 in the Dictionary of Occupational Titles, Employment and Training Administration, U. S. Department of Labor, the description of the work of the occupation under that code is not consistent with Employer's application. As the Employer later said that 95% of its work is rewinding of electric motors, it is assumed that the rewinding of electric motors was the primary operation to be performed in the position to be filled. Compare AF 01. According to the entry under occupational code 721.484-010 of the Dictionary, an electric motor winder assembles and tests electric motor and generator stators, armatures, or rotors; inspects cores for defects and aligns laminations; files burrs from core slots. The worker lines slots with sheet insulation and inserts coils into slots; cuts, strips, and bends wire leads at ends of coils; and twists leads together to connect coils and tapes coil and end windings to shape. The worker also tests windings for motor housing clearance, grounds, and short circuits; winds new coils on armatures, stators or rotors of used motors and generators; and may rewind defective coils. As occupational code 721.484-010 relates to electric motors and the occupational code 710.261.010 refers to fabrication and repair of instruments for measuring, controlling and indicating physical characteristics, it may be found that the CO misclassified the job for which the Employer wishes to hire the Alien.

Employer in violation of 20 CFR § 656.21(b)(6).(AF 09-11). After reviewing the U. S. applicant resumes and Employer's recruitment report, the CO stated that a U. S. applicant, Dien Nguyen Van, appeared to meet the minimum requirements of the job, but the Employer reported that it found him unqualified for the advertised position and did not provide job related reasons in rejecting this worker. AF 16. The CO said Employer could rebut this finding "by showing with specificity" its reasons for rejecting the application of Mr. Van for the position.

Rebuttal. As the CO did not challenge Employer's rejection of the qualifications of applicants other than Dien Nguyen Van, the matching of their resumes to the job is not an issue. The Employer's letter rejecting one of those U. S. workers describes the nature of its business and the skills it expected of the employee it was seeking:

> ...We are a specialty company engaged in the repairing and alteration of small and large, AC and DC electric motors. This is a specialty that is not often found today. ...

AF 51.[2] On its face, the resume submitted by Mr. Van met the minimum requirements for the job with representations that he had substantial experience in repairing and rebuilding electric motors, transformers, and dynamos, and the academic background described in Employer's application. AF 52, with which compare AF 40, 43, 44, 46-49, 54-55, 56. Accordingly, the Employer gave him an opportunity to demonstrate his capacity to perform the duties of the position, which was the same test it gave all applicants for work in this position.

In its application the Employer initially explained that it had rejected Mr. Van as incompetent to perform the job advertised and added further details that give an insight into its evaluation of him:

> The applicant [Mr. Van] is not qualified for the present position, but he can be used in a training position, and we have made him such an offer which he is considering[.] [M]eanwhile he can do soldering and miscellaneous small jobs, provided he can prove his permission to work. His very poor English is a serious handicap. ...

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[2]While the resume of Phu G. Ho in AF 54-55 is noted, the CO did not challenge Employer's rejection of this candidate, whose resume suggested that he was qualified for this position. After interviewing him by telephone, however, the Employer concluded that he was "not qualified due to lack of any knowledge of DC single-phase motors." Its report then added, "Talking with him revealed that his resume was highly inflated." As these circumstances suggest that the CO accorded credibility to the Employer's recruitment report, this account of the Employer's recruitment activities seems to explain why the CO did not preserve its rejection of Mr. Ho as an issue. **Mary Zumot**, 89-INA-35(November 4, 1991).

The Employer added that even if it hired Mr. Van, however, it would still need the Alien in the position of Electric Motor Winder and Repairman. AF 33. In rebuttal to the NOF the Employer wrote on June 14, 1994,

> After interviewing M. Dien Nguyen Van, we found he was not qualified for the position. Mr. Van did not know how to correctly rewind AC motors. Mr. Van did not have sufficient knowledge for redesigning motors or in the repairs of solid state controls.
>
> Mr. Van was eligible for a training position. We made three attempts to contact Mr. Van but our calls were not returned and Mr. Van never came back to our shop.

AF 11-12. As will appear infra, the CO regarded this summary discussion as insufficiently detailed for the purposes of the Act and regulations.

Final Determination. Under 20 CFR § 656.24(b)(2)(ii) the CO must consider a U. S. worker to be able and qualified for the job opportunity, if by education, training, or experience, or by a combination of these factors the U. S. worker is able to perform in the normally accepted manner the duties of the occupation as customarily performed by other U. S. workers similarly employed. The CO again observed that Mr. Van's resume appeared to meet the minimum requirements of the job, but noted that Employer stated in its January 27, 1994, recruitment results report that Mr. Van was not, in fact, qualified for the position. The CO then said that the NOF required Employer to provide job related reasons for rejecting Mr. Van for the position of Electric Motor Winder and Repairman in its shop. For example, said the CO, the Employer could have said under 20 CFR §§ 656.21(j)(1)(iv) and 656.21(b)(6) that Mr. Van did not meet its requirement for experience in the field, even though his written resume was construed as having asserted adequate experience to meet its minimum criteria. The CO summed up this finding as follows:

> A review of Mr. Van's resume revealed that he owned his own repair shop for over ten years. He indicated that he could rebuild and repair everything electric in home and industry. The reasons given by the employer for rejection of Mr. Van are based on factors which can only be determined from actual job performance. ... According to Mr. Van's resume, he has many years of experience repairing and working with electric motors and would be able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U. S. workers similarly employed. Therefore, he is qualified for the position.

In denying certification, the CO concluded,

> The employer's reasons for rejecting Mr. Van are not probative. He [the Employer] has not shown that Mr. Van would be unable to perform the job in the normally accepted manner as customarily performed by other U. S. workers similarly employed.

AF 10. On its face this requires that we construe Employer's statement that after interviewing Mr. Van, it found him unqualified for the position on grounds that he did not know how to rewind AC motors correctly, and did not have sufficient knowledge for redesigning motors or repairing solid state controls. While not questioning the truth of these assertions the CO concluded that they were "not probative." The CO said "probative" evidence required was proof that "Mr. Van would be unable to perform the job in the normally accepted manner as customarily performed by other U. S. workers similarly employed."

As the Employer's rebuttal did not connect the factors that required rejection of Mr. Van with an "actual job performance," the CO denied certification on August 19, 1994. AF 02-04. Later, the Employer finally presented evidence to remedy this omission from its application and rebuttal, as first indicated in the NOF.

"Reply to Final Determination." In response to the CO's Final Determination, the Employer filed a "reply to Final Determination" in which it offered the following information on September 20, 1994:

> Mr. Van was given the same test as is given to every potential employee.
>
> He was given a five horsepower motor, which had to be rewound. This procedure is 95% of the work done by employer's company. An acceptable time for completing this operation is 6 hours, or at most 8 hours.
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> Mr. Van spent four days, from January 25 through January 28, on this job. He grounded a noninsulated wire to a stator, so that the motor shorted out. The motor had to be disassembled and wired again. This job normally takes six hour to complete. He was unable to complete it in four days. He was obviously not prepared to do the job. We offered Mr. Van a job as apprentice, however he did not return the next day to accept that position, or to complete the job he had been assigned.
>
> Since our work consists almost entirely of motor winding, it is obvious that Mr. Van has job-related deficiencies which make it impossible for us to use him in our factory.

AF 01; compare AF 13, 33.

Discussion. The information Employer set forth in AF 01 explicitly demonstrated that, in spite of representations in Mr. Van's resume, an "actual job performance" had demonstrated that he would be unable to perform the work of an Electric Motor Winder and Repairman in the normally accepted manner that the job customarily was performed by a U. S. worker. As the CO's Final Determination was dated August 19, 1994, it was not final on September 20, 1994, when the Employer filed this "reply" within the thirty-five day appeal period of 20 CFR § 656.26(b).

Consequently, the document filed by the Employer has been examined to determine whether it can be construed as a motion for reconsideration and to reopen the record, since this proffer of evidence appears on its face to comply with the CO's order in the NOF. The CO concluded in the NOF that Employer failed to show with specificity the job related reasons for its rejection of Mr. Van. AF 16. As the CO explained in the Final Determination, the Employer failed to provide in either the report of recruitment or in its rebuttal a full and circumstantial account of the "on the job" trial it had given to Mr. Van. AF 01, 09-10.

On examination of the NOF, the rebuttal and the Final Determination it appears that the CO's use of regulatory language in the NOF failed to communicate the instructions of the CO with such clarity as to cause the Employer to comply, even though the words used may have been technically correct. Employer's failure to comprehend is demonstrated by in its "reply to Final Determination," which belatedly showed that (1) the nature and content of the proof the CO delineated in the Final Determination was potentially sufficient to satisfy the defects cited in the NOF; (2) Employer's conclusory assertions of Mr. Van's lack of qualification in its application and rebuttal could be shown to have been based on actual job performance; (3) the language of the NOF was less explicit than the language of the CO's Final Determination, which finally succeeded in evoking an explicit response from the Employer.

As the object of the Employer's reply is that the CO weigh such new information, the reply to Final Determination may be treated as an unartfully expressed request by the Employer for reconsideration by the CO, and for the reopening of the record to admit newly proffered information about Mr. Van's actual job performance. In weighing this as a motion to reconsider and reopen the record, some background facts have been noted that bear on the weight that may be given Employer's new assertions. First, the CO's acceptance of the Employer's finding that its interview with Mr. Ho, another candidate, suggested that their resumes required careful analysis to determine whether the U. S. candidates had overstated their qualifications to perform the work of this position as an Electric Motor Winder and Repairman. This is inference is consistent with Employer's offer to hire Mr. Van as an apprentice with the implied objective of improving his

skills to the point where he could be advanced to the position it seeks to fill.

Second, the Employer's explanation at AF 51 that its business of repairing and altering small and large AC and DC electric motors is "a specialty that is not often found today" persuasively supports the inference that this is a niche enterprise that actively seeks to hire competent workers skilled in the special technology of its business. It is inferred from this that the Employer would have preferred to hire and train Mr. Van to be an Electric Motor Winder and Repairman in view of his background, if it was given the opportunity. Accordingly, if the record was reopened the CO would have the opportunity to receive and evaluate the newly supplied job related reasons why Mr. Van was rejected as a candidate for this job. **Dr. and Mrs. Frederic Witkin**, 87-INA-532(February 27, 1989); and see **Nancy Johnstone,** 87-INA-541(May 31, 1989).

Finally, the Claimant's apparent failure to understand and act on the CO's NOF instructions would result in an injustice, even though the denial of this application based on Employer's failure to rebut was within the discretion of the CO, based on this record. **Buena Vista Landscape**, 90-INA-392(March 5, 1991, July 9, 1991); and see **Madeleine S. Bloom**, 88-INA-152(October 13, 1989, December 20, 1989)(en banc).

The Board has held that Certifying Officers have the authority to reconsider the Final Determination prior to its becoming final. **Harry Tancredi**, 88-INA-441(December 1988). The CO must decide whether to grant or deny Employer's motion before the Board can address the matter. **Charles Serouya & Son, Inc.,** 88 INA-261(March 13, 1989); **Karen S. Chesley,** 89-INA-184(November 29, 1989). For these reasons, this request for reconsideration must be remanded to the Certifying Officer to determine the Employer's motion to reconsider and reopen the record to admit the newly added evidence of the performance test of the skills of Mr. Van. If the record is reopened, the CO may weigh such new evidence before CO determining whether the Employer's reasons for rejecting U. S. applicants were sufficient to comply with the Act and regulations.

Accordingly, the following order will enter.

ORDER

This application is remanded to the Certifying Officer to determine the Employer's motion to reconsider and reopen the record and for such further proceedings as the Certifying Officer may deem appropriate under all of the facts of this case.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **PALO ALTO ELECTRIC MOTOR CORP.**
(**ADOLFO TRIGUEROS**)

Case No: 95-INA-249

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: December 19, 1996.